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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES F. MCGUINESS, Operations Specialist Chief,
United States Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the United States Constitution's Appointments Clause preclude Congress from granting the Judge Advocate General of the Navy the power to appoint military trial judges?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION, STATUTE, AND REGULATION INVOLVED	2
STATEMENT OF THE CASE	2
REASON FOR GRANTING THE WRIT	3
CONGRESS' PLACEMENT OF THE POWER TO APPOINT MILITARY TRIAL JUDGES IN THE JUDGE ADVOCATES GENERAL IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION	3
CONCLUSION	9
APPENDIX A	
(Opinion of the U.S. Court of Military Appeals)	1a
APPENDIX B	
(Opinion of the U.S. Navy-Marine Corps Court of Military Review)	11a
APPENDIX C	
(U.S. Const. Art. II, § 2)	22a
APPENDIX D	
(10 U.S.C. § 826)	23a
APPENDIX E	
(Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801)	25a
APPENDIX F	
(Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992))	30a

TABLE OF AUTHORITIES

Constitutional Provisions:	Page
U.S. Const. Art. II, § 2, cl. 2	4
U.S. Const. Art. I, § 8, cl. 14	7
Cases:	
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam)	4, 6, 7
Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991)	4, 5, 6, 8
Glidden Co. v. Zdanok, 370 U.S. 530 (1962)	8
Olympia Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C. 1990)	7-8
Shoemaker v. United States, 147 U.S. 282 (1893)	7, 8
United States v. Brown, 28 M.J. 470 (C.M.A. 1989)	4
United States v. Coffman, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam)	6, 7
United States v. Graf, 35 M.J. 450 (C.M.A. 1992)	6
United States v. Prive, 35 M.J. 569 (C.G.C.M.R. 1992)	6, 7
Statutes:	
Military Justice Act of 1983, 97 Stat. 1405 (1983)	8
10 U.S.C. § 818	3
10 U.S.C. § 819	3
10 U.S.C. § 826	4
10 U.S.C. § 848	3
10 U.S.C.A. § 867a (West Supp. 1992)	9
10 U.S.C. § 934	2
10 U.S.C.A. § 5148 (West Supp. 1992)	5
28 U.S.C.A. § 1259(3) (West Supp. 1992)	2, 8-9
Regulations:	
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801	3-4
Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002	4
Miscellaneous:	
Annual Report on Military Justice, 34 M.J. LVII (1991)	3

TABLE OF AUTHORITIES—Continued

	Page
H.R. Rep. No. 549, 98th Cong., 1st Sess. (1983)	9
Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992)	4-5

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, James F. McGuinness, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on September 14, 1992.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992), is reprinted as Appendix A.

The opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. McGuinness*, 33 M.J. 781 (N.M.C.M.R. 1991), is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals affirmed the decision of the United States Navy-Marine Corps Court of Military Review on September 14, 1992. 28 U.S.C.A. § 1295(3) (West Supp. 1992) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Military Appeals' decision.

CONSTITUTIONAL PROVISION, STATUTE, REGULATION, AND MEMORANDUM INVOLVED

The pertinent portion of Art. II, § 2 is set forth in Appendix C. The text of 10 U.S.C. § 826 is set forth in Appendix D. The text of Rule for Courts-Martial 801 is set forth in Appendix E. The text of Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992), is set forth in Appendix F.

STATEMENT OF THE CASE

At a general court-martial, petitioner pled guilty to and was found guilty of two counts of violating a lawful general order and two counts of violating the Federal Espionage Act in violation of 10 U.S.C. §§ 892 and 934, and 18 U.S.C. §§ 793(e) and 793(f).[1] The trial judge sentenced petitioner to confinement for 2 years, forfeiture of all pay and allowances, reduction to the lowest enlisted rank, and a bad-conduct discharge. On appeal, the Navy-Marine Corps Court of Military Review set aside the 18 U.S.C. § 793(f) conviction on statute of limitations grounds, but affirmed the remaining convictions and the sentence. *United States v. McGuinness*, 33 M.J. 781 (N.M.C.M.R. 1991). The Court of Military Appeals exercised its discretionary jurisdiction to consider three

[1] Article 134 of the Uniform Code of Military Justice allows service members to be tried by courts-martial for violating any non-capital federal criminal statute. 10 U.S.C. § 934 (1988).

challenges to petitioner's 18 U.S.C. § 793(e) conviction. The Court of Military Appeals rejected petitioner's challenges to the conviction and affirmed the Navy-Marine Corps Court's decision. *United States v. McGuinness*, 35 M.J. 149 (C.M.A. 1992).

REASON FOR GRANTING THE WRIT

CONGRESS' PLACEMENT OF THE POWER TO APPOINT MILITARY TRIAL JUDGES IN THE JUDGE ADVOCATES GENERAL IS A STRUCTURAL CONSTITUTIONAL DEFECT IN THE MILITARY JUSTICE SYSTEM WHICH DEMANDS IMMEDIATE ATTENTION.

Each year, thousands of service members are tried by courts-martial. In Fiscal Year 1991, for example, there were 2,610 general courts-martial and 5,538 special courts-martial.[2] Annual Report on Military Justice, 34 M.J. LVII, CV, CXIX, CXXXII, CXLII (1991). The judges who preside over general courts-martial are, for all practical purposes, the equivalent of United States District Court judges presiding over felony trials. A general court-martial judge has far-ranging powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power."[3] Man-

[2] General courts-martial can impose any authorized sentence including, in some cases, death. 10 U.S.C. § 818 (1988). Special courts-martial, on the other hand, may impose no more than six months' confinement. 10 U.S.C. § 819 (1988). Special courts-martial can, however, sentence service members to be separated with a bad-conduct discharge. *Id.*

[3] "A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100, or both." 10 U.S.C. § 848 (1988).

ual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801(a)-(b). In a case such as this, where the accused chooses a bench trial, a court-martial judge has even more discretion than a federal district court judge because the court-martial judge is not constrained by the Federal Sentencing Guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n.3 (C.M.A. 1989). The trial judge in this case could have imposed any sentence ranging from no punishment to confinement for 10 years. Record at 50; *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.[4]

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, cl. 2. Congress can devolve appointment authority upon no other official. *Freytag v. Commissioner of Internal Revenue*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military trial judges, who exercise extraordinary authority and discretion, are Officers of the United States. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). Yet Congress vested the power to appoint military trial judges in the Judge Advocates General. 10 U.S.C. § 826. Placing the power to appoint judges in such low-level officials[5] raises a serious question under the Appointments Clause.

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[4] "Subject to limitations in this Manual, the sentence to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized by this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment."

[5] The Judge Advocates General are not even the primary legal advisors in their respective services. Rather, "The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the

As in *Freytag*, "[i]t is beyond question . . . that Congress did not intend to grant to the President the power" to appoint military trial judges. 111 S. Ct. 2642. Nor is the Judge Advocate General of the Navy, who is a subordinate of the Secretary of the Navy, 10 U.S.C.A. § 5148 (West Supp. 1992), a Head of a Department. It is self-evident that the Judge Advocate General of the Navy, who is by statute an Executive Branch officer tasked with performing legal duties "under the direction of the Secretary of the Navy," *id.* at § 5148(b), (d), is not a "Court of Law." Thus, Congress gave the power to appoint military trial judges to an impermissible official.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. This concern is directly implicated by allowing the Judge Advocates General to appoint military trial judges. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).

Department of Defense as the chief legal officer of the Department of Defense." Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments and General Counsel of the Department of Defense (March 3, 1992) [Appendix F].

The significance of the Appointments Clause defect is magnified by the fact that military trial judges serve without the protection of a fixed term of office. *See generally United States v. Graf*, 35 M.J. 450 (C.M.A. 1992). Thus, not only are military trial judges *appointed* by the Judge Advocate General, they serve at the pleasure of the Judge Advocate General, who may *remove* them from office. Giving such a low-level official the power of appointment and removal carries the risk that these powers will be used to advance the Judge Advocate General's parochial interests.

The appointment of military trial judges in violation of the Appointments Clause is a serious constitutional defect which the Court should address immediately. In *Freytag*, the Court indicated that "[t]he alleged defect in the appointment of the special trial judge goes to the validity of the Tax Court proceeding that is the basis for this litigation." 111 S. Ct. at 2639. This comports with the Court's earlier recognition that individuals appointed in violation of the Appointments Clause may not be involved in "the administration and enforcement of the public law[.]" *Buckley v. Valeo*, 424 U.S. at 139. Thus, until Congress places the power to appoint military trial judges in a constitutionally permissible official, every court-martial is invalid.

Two of the Courts of Military Review have recently addressed whether the Judge Advocates General may constitutionally appoint military judges. For different reasons, both the Coast Guard and Navy-Marine Corps Courts of Military Review affirmed the practice. *United States v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam). Neither court's reasoning, however, can withstand scrutiny.

In *United States v. Prive*, 35 M.J. 569 (C.G.C.M.R. 1992), the Coast Guard Court of Military Review ex-

pressly held that general court-martial judges are officers, not mere employees, of the United States. 35 M.J. at 572-73. The Coast Guard Court, however, held that Congress is not bound by the Appointments Clause when exercising its Article I, Section 8, Clause 14 powers to regulate the land and naval forces. 35 M.J. at 576-77. This holding is inconsistent with this Court's command that "[u]nless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam). Thus, *Prive* was wrongly decided.

In *United States v. Coffman*, 35 M.J. 591 (N.M.C.M.R. 1992) (per curiam), the Navy-Marine Corps Court of Military Review held that the method by which military trial judges are appointed satisfies the Appointments Clause because all of those judges had earlier been appointed and confirmed as military officers. 35 M.J. at 592. This argument, however, misses the whole point of the Appointments Clause. While the trial judge in this case was appointed by the President *as a military officer*, he was not appointed by the President *as a judge*. Judge Rapp had the authority to sentence petitioner *not* because Judge Rapp was a Navy captain, but because he was filling the office of general court-martial judge. The *independent* judicial authority which Judge Rapp and other military trial judges wield is quite different from the structured, accountable authority which other military officers exercise.

Coffman relied in part on *Shoemaker v. United States*, 147 U.S. 282 (1893). 35 M.J. at 592. This reliance, however, is misplaced. Judge Lamberth emphasizes, "[T]he provision challenged in *Shoemaker* added certain duties to two *offices*; it did not confer additional responsibilities on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732

F. Supp. 1183, 1192 (D.D.C. 1990). *Shoemaker* is entirely irrelevant to the question of how military trial judges are appointed because Congress did not provide that service as a judge is an additional duty of a designated *office*. A general court-martial judgeship is not an appurtenance of some other position. Rather, it is an office unto itself. Unlike the two military officers at issue in *Shoemaker*, military trial judges do not serve *ex officio*. Thus, *Shoemaker* does not resolve the Appointments Clause issue.

Although this issue was not raised below, the Court should not treat it as waived or forfeited. *See Freytag*, 111 S. Ct. at 2647 n.2 (Scalia, J., concurring). As noted in *Freytag*, the Court "has exercised its discretion to consider nonjurisdictional claims that have not been raised below." 111 S. Ct. at 2639 (citing, *inter alia*, *Glidden Co. v. Zdanok*, 370 U.S. 530, 535-36 (1962)). The Court emphasized, "*Glidden* expressly included Appointments Clause objections to judicial officers in the category of nonjurisdictional structural constitutional objections that could be considered on appeal whether or not they were ruled upon below." *Freytag*, 111 S. Ct. at 2639. Due to this issue's importance to the military justice system and to the rule of Constitutional law, the Court should hear the Appointments Clause issue.

Finally, this Court has jurisdiction to resolve the Appointments Clause question even though the Court of Military Appeals did not grant review on this issue. The Military Justice Act of 1983, which established this Court's certiorari jurisdiction over Court of Military Appeals decisions, limited this Court's certiorari jurisdiction to cases in which the Court of Military Appeals exercised mandatory jurisdiction, cases in which the Court of Military Appeals granted review, and other cases in which the Court of Military Appeals granted relief. Military Justice Act of 1983, § 10(a)(1), 97 Stat. 1405, 1406 (1983) (codified at 28 U.S.C.A. § 1259 (West Supp.

1992)); *see also* 10 U.S.C.A. § 867a (West Supp. 1992). The Military Justice Act of 1983's legislative history indicates, "In view of current concerns about the Supreme Court's docket, the legislation has been drafted in a manner that will limit the number of cases subject to direct Court review." H.R. Rep. No. 549, 98th Cong., 1st Sess. 16-17 (1983). The number of cases subject to review is the same regardless of whether this Court's certiorari jurisdiction is limited to issues actually considered by the Court of Military Appeals. Thus, the limitation's purpose was not to insulate certain issues from review by this Court, but rather to prevent an intolerable increase in this Court's workload. This Court may, in the exercise of its judicial discretion, review any issue in a case which meets 28 U.S.C. § 1259's requirements.

CONCLUSION

The manner in which military trial judges are appointed presents a serious constitutional issue: may Congress vest the power to appoint Article I court judges in an official who is statutorily subordinate to the Secretary of a Department? The judges who are now selected by the Judge Advocates General preside over thousands of courts-martial every year. These judges, who wield awesome authority over the defendants who come before them, should be selected in conformance with the Appointments Clause. Accordingly, the Court should issue a writ of certiorari.

Respectfully submitted,

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December 14, 1992

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 67,241
NMCM 89 2090

UNITED STATES,
Appellee,

v.

JAMES F. MCGUINNESS,
Operations Specialist Chief, U.S. Navy,
Appellant.

Argued May 7, 1992

Decided Sept. 14, 1992

For Appellant: *Captain Dwight H. Sullivan*, USMC (argued).

For Appellee: *Lieutenant Ralph G. Stiehm*, JAGC, USNR (argued); *Colonel T.G. Hess*, USMC (on brief); *Major Laura L. Scudder*, USMC.

Opinion of the Court

GIERKE, Judge:

Before a military judge sitting as a general court-martial, appellant pleaded guilty to two specifications of violating a Navy Regulation (OPNAVINST 5510.1G) by failing to safeguard classified materials in his possession, in violation of Article 92, Uniform Code of Military Jus-

tice, 10 USC § 892, and violating 18 USC § 793(e) and § 793(f)(1), charged under Clause 3* of Article 134, UCMJ, 10 USC § 934. The military judge sentenced him to a bad-conduct discharge, confinement for 2 years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence. The Court of Military Review set aside the conviction of 18 USC § 793(f)(1) because prosecution was barred by the statute of limitations, affirmed the remaining findings of guilty, and affirmed the sentence. 33 MJ 781, 783 (1991). We granted review of the following issues:

I

DOES THE MANUAL FOR COURTS-MARTIAL'S PREEMPTION PROVISION PROHIBIT THE GOVERNMENT FROM TRYING AN ACCUSED FOR THE ARTICLE 134 OFFENSE OF VIOLATING THE FEDERAL ESPIONAGE ACT WHERE THE SAME MISCONDUCT COULD HAVE BEEN CHARGED AS THE ARTICLE 92 OFFENSE OF VIOLATING THE NAVY'S INFORMATION SECURITY REGULATION?

---

* Article 134 provides: "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court." The "crimes and offenses not capital" provision is commonly referred to as "Clause 3." Paragraph 60c(4)(b), Part IV, Manual for Courts-Martial, United States, 1984, explains: "Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under Clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred."

II

DOES APPLICATION OF 18 USC § 793(e) TO A CASE WHERE A SERVICEMEMBER HAD AN APPROPRIATE SECURITY CLEARANCE AND INITIALLY CAME INTO POSSESSION OF CLASSIFIED DOCUMENTS IN THE PERFORMANCE OF HIS OFFICIAL DUTIES VIOLATE THE FIFTH AMENDMENT NOTICE REQUIREMENT?

III

MAY A SERVICEMEMBER BE CONVICTED OF AN 18 USC § 793(e) VIOLATION WHERE HE RETAINED CLASSIFIED DOCUMENTS WITH THE INTENT TO USE THEM IN THE PERFORMANCE OF HIS OFFICIAL DUTIES?

Appellant had been in the Navy for over 18 years and had been an operations specialist for 16 years. He had handled classified materials during his entire career as an operations specialist. One of the violations of Navy regulations and the statutory violation were based on appellant's retention of 311 classified items, acquired during previous assignments, and taking them home where he did not properly safeguard them.

The pertinent portion of paragraph 13-2.1, OPNAVINST 5510.1G (1984) provides: "Any one who has possession of classified material is responsible for safeguarding it at all times and particularly for locking classified material in appropriate security equipment whenever it is not in use or under direct supervision of authorized persons." Title 18 USC § 793(e) prohibits anyone "having unauthorized possession of, access to, or control over," classified material from "willfully retain[ing] the" material "and fail[ing] to deliver it to the officer or employee of the United States entitled to receive it."

During the plea inquiry, appellant told the military judge that he had lawfully acquired the classified items during previous assignments and retained them in his home as personal reference material. He told the military judge that, when he completed his previous assignments, he was required to either return or destroy the documents, or to transmit them through authorized channels to his next duty station. The military judge inquired into appellant's knowledge of the proper security procedures as follows:

> MJ: Would it be safe to say that you've been working with classified material since you first became an [operations specialist]?
>
> ACCUSED: Yes, sir.
>
> MJ: And have you had regular briefings, and lectures, and training in the proper methods of handling, safeguarding, and storing classified material?
>
> ACCUSED: At each duty station, we were given that.
>
> MJ: And as a chief petty officer, were you even, yourself, involv[ed] in giving that kind of training to lower rated people?
>
> ACCUSED: Yes, sir.
>
> MJ: And maybe even enforcing those kinds of rules within the spaces under your control?
>
> ACCUSED: Yes, sir.
>
> MJ: So was there any doubt in your mind what your obligations were with regard to the storage, handling, access, removal, or whatever of classified material?
>
> ACCUSED: No, sir. There was no doubt as to my responsibility.

The military judge treated all four offenses to which appellant pleaded guilty as separate for findings, but he treated them as a single offense for sentencing.

I. Preemption

Appellant contends that the preemption doctrine in paragraph 60c(5)(a), Part IV, Manual for Courts-Martial, United States, 1984, prohibits prosecuting him for a violation of 18 USC § 793(e), incorporated into the Uniform Code of Military Justice by Clause 3 of Article 134, because the same conduct is punishable under Article 92. Paragraph 60c(5)(a) states: "The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." Appellant argues that this provision created a new preemption doctrine, more stringent than the previous common-law doctrine. We agree with the court below (33 MJ at 783-84) that the Manual provision did not create a new preemption doctrine but merely codified existing military law. Drafters' Analysis to paragraph 60c(5)(a), Manual, *supra* at A21-99.

Paragraph 60c(5) codifies a doctrine articulated early in this Court's history that "Article 134 should generally be limited to military offenses and those crimes not specifically delineated by the punitive Articles." *United States v. Norris*, 2 USCMA 236, 239, 8 CMR 36, 39 (1953). The doctrine provides

> that where Congress has occupied the field of a given type of misconduct by addressing it in one of the specific punitive articles of the code, another offense may not be created and punished under Article 134, UCMJ, by simply deleting a vital element.

United States v. Kick, 7 MJ 82, 85 (CMA 1979). Congress has "occupied the field" if it "intended for one punitive article of the Code to cover the type of conduct

concerned in a comprehensive . . . way." *United States v. Maze*, 21 USCMA 260, 262, 45 CMR 34, 36 (1972).

Preemption applies only if two questions are answered in the affirmative:

> The primary question is whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; the secondary question is whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of either Articles 133 or 134, which, because of their sweep, are commonly described as the general articles.

United States v. Wright, 5 MJ 106, 110-11 (CMA 1978).

The underlying basis for the preemption doctrine is Congress' and this Court's long-standing unwillingness to permit prosecutorial authorities "to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134." *United States v. Norris*, 2 USCMA at 239, 8 CMR at 39.

Turning first to the question whether Congress has "occupied the field," the specific question in this case is whether Congress intended that prosecutions for failure to properly safeguard classified materials be limited to regulatory violations charged under Article 92. We answer that question in the negative. None of the punitive articles of the Code specifically cover the duty to protect classified information. We have found nothing in the legislative history of Articles 92 and 134 indicating that Congress intended that general orders would preempt offenses made applicable to the military by Clause 3 of Article 134.

The second question posed in *Wright* is likewise answered in the negative. Appellant was not charged with

the "residuum" of another punitive article but, rather, with a violation of a specific penal statute codified as 18 USC § 793(e).

We hold that prosecution of violations of 18 USC § 793(e) under Clause 3 of Article 134 is not preempted by Article 92. *Cf. United States v. Baba*, 21 MJ 76 (CMA 1985) (regulatory violation charged under Article 92 and violation of 18 U.S.C. § 793(d), charged under Article 134, held multiplicious for findings, but preemption not considered); *United States v. Ettleson*, 13 MJ 348, 358-59 (CMA 1982) (drug offense could be charged under either Article 92 or Article 134).

II. Notice of Criminality

Appellant contends that 18 USC § 793(e) does not give adequate notice of criminality because the term "unauthorized" is too vague. The prosecution theory was that appellant's possession of classified materials, although initially authorized, became "unauthorized" when he retained them and took them home. Appellant cites *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), *cert. denied*, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982), and *United States v. Morison*, 844 F.2d 1057 (4th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 259, 102 L.Ed.2d 247 (1988), in support of the proposition that the term "unauthorized" presents "potential vagueness problems."

We need not decide whether some hypothetical situation might present "potential vagueness problems." The question in this case is whether appellant was on notice that keeping the classified materials, which he had lawfully acquired during previous assignments, and storing them in his home was "unauthorized." As observed by the Supreme Court:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Colten v. Kentucky, 407 U.S. 104, 110, 92 S.Ct. 1953, 1957, 32 L.Ed.2d 584 (1972).

We need to decide only whether appellant's conduct "is plainly within" the terms of the statute, "even though marginal cases could be" postulated "where doubts might arise." *United States v. Harriss*, 347 U.S. 612, 618, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). If appellant is not one of the "rare 'entrapped' innocents but one to whom the statute clearly applies, he has no standing to challenge successfully the statute under which he is charged." *United States v. Morison*, 844 F.2d at 1071, *citing Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 2561, 41 L.Ed.2d 439 (1974). *See United States v. Scoby*, 5 MJ 160, 162-63 (CMA 1978) ("Where there is 'a substantial range of conduct' to which" a statute applies, the statute "is not fatally deficient, even though an area of uncertainty may remain.").

Appellant clearly was on notice that he was not authorized to retain the classified materials and store them in his home. During the plea inquiry, he told the military judge that he had worked with classified materials for the past 16 years and that he knew that he had no authority to retain the materials and store them in his home. He admitted to the military judge, "There was no doubt as to my responsibility." Appellant's conduct clearly was "unauthorized," and he admitted that he knew it. Accordingly, we reject his appellate claim that the statute was too vague to put him on notice that his retention of the classified material in his home was "unauthorized."

III. Mens Rea

Appellant contends that the element of willfulness in 18 USC § 793(e) includes an element of bad faith, evidenced by a sinister purpose to injure the interests of the United States. The military judge defined the term "willful" as "an intentional violation of a known legal duty." Appellant argues that, because he intended only to keep the classified items as personal reference material in future duty assignments, he did not entertain the mens rea required by the statute. We disagree.

The statute in question is part of the Espionage Act of 1917, as amended by the Internal Security Act of 1950. "When a statute is a part of a larger Act . . . the starting point for ascertaining legislative intent is to look to other sections of the Act *in pari materia* with the statute under review." *United States v. Morison*, 844 F.2d at 1064. Sections 793(a) and 794(a) require that the act be done, "with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation." Sections 793(d) and (e), however, require only that the accused act "willfully." The current version of § 793(e), as amended in 1950, criminalizes willful retention of classified materials by someone not authorized to retain them. Section 793(f) has an even lower threshold, punishing loss of classified materials through "gross negligence" and punishing failing to promptly report a loss of classified materials. While "§ 794 covers 'classic spying'"; § 793(e) "cover[s] a much lesser offense than that of 'spying.'" *Id.* at 1065.

Based on our analysis of the statute in question and a review of its legislative history, "we conclude that there is no basis in the legislative record for finding that Congress intended to limit" prosecutions for violation of § 793(e) "to 'classic spying'" *Id.* at 1070. To the contrary, it is clear that Congress intended to create a hierarchy of offenses against national security, ranging

from "classic syping" to merely losing classified materials through gross negligence. We hold, as did the court below, that appellant was properly advised of the requisite mens rea for a violation of § 793(e) and that he admitted facts sufficient to establish his guilt. *Cf. United States v. Morison*, *supra* (selling classified photographs in effort to obtain future employment by publisher violated § 793(d)); *United States v. Truong Dinh Hung*, 629 F.2d at 919 ("willfully" defined in terms of "personal or underhanded motive.")

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD and WISS concur.

APPENDIX B

U.S. NAVY-MARINE CORPS COURT OF MILITARY REVIEW

NMCM 89 2090

UNITED STATES

v.

JAMES F. MCGUINNESS, 147 44 6604, Operations Specialist Chief (E-7), U.S. Navy

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Sentence Adjudged 27 Jan. 1989

Decided 7 Aug. 1991

Capt Dwight H. Sullivan, USMC, Appellate Defense Counsel.

LT L. Lynn Jowers, JAGC, USN, Appellate Government Counsel.

Before WILLEVER, STRICKLAND, and JONES, JJ.

STRICKLAND, Senior Judge:

Consistent with his pleas, appellant was found guilty at a general court-martial of two specifications of violating a general regulation, Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892, and two specifications of violating the Federal Espionage Act, 18 U.S.C. §§ 793(e) and 793(f), as incorporated by clause 3 of

Article 134, UCMJ, 10 U.S.C. § 934.[1] The military judge sentenced appellant to confinement for two years, forfeiture of all pay and allowances, reduction to E-1, and a bad-conduct discharge. The convening authority approved the adjudged findings and sentence.

On appeal[2] the appellant assigned five errors and one additional error.[3] As to error IV, the Government con-

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[1] The regulation that appellant violated was OPNAVINST 5510.1G, Department of the Navy Information and Personnel Security Program Regulation, dated 20 April 1984. The appellant had removed, over a number of years, approximately 311 pieces of classified materials from their secured areas and stored them at his residence. Appellant asserted, and there was no evidence to the contrary, that the classified information had been unlawfully retained for future professional use as reference materials.

[2] We have also heard oral argument.

[3] I. THE MILITARY JUDGE ERRED BY ACCEPTING THE APPELLANT'S GUILTY PLEA TO VIOLATING THE FEDERAL ESPIONAGE ACT BECAUSE THE SAME MISCONDUCT COULD HAVE BEEN CHARGED AS THE ARTICLE 92 OFFENSE OF VIOLATING THE INFORMATION SECURITY REGULATION.

A. *Prosecution under 18 U.S.C. § 793(e) for Unauthorized Retention of Classified Documents Was Preempted by the Article 92 Offense of Violating OPNAVINST 5510.1G §§ 10-10, 10-12.*

B. *Prosecution under 18 U.S.C. § 793(f)(1) for Permitting Removal of Classified Documents from their Proper Place of Custody Was Preempted by the Article 92 Offense of Violating OPNAVINST 5510.1G § 13-2 (1984).*

II. THE MILITARY JUDGE ERRED BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO WILLFULLY RETAINING CLASSIFIED MATERIALS OF WHICH HE HAD UNAUTHORIZED POSSESSION WHEN THE PROVIDENCE INQUIRY REVEALED THAT APPELLANT WAS INITIALLY AUTHORIZED TO POSSESS THE MATERIALS.

III. THE MILITARY JUDGE ERRED BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO WILLFULLY RETAINING CLASSIFIED MATERIAL BECAUSE THE PROVI-

ceded that the appellant did not affirmatively waive the statute of limitations as to Specification 5 of Charge II (the § 793(f) charge) and agreed the specification should be dismissed. We also agree. As to the additional error, this Court decided the same issue in *United States v. Allen* 31 M.J. 572 (N.M.C.M.R.1990) (*en banc*), *pet. granted*, and therefore, we find it has no merit. The remaining assigned errors will be discussed individually.

I. Preemption Doctrine

Appellant has presented a novel argument on the application of the preemption doctrine to the Article 134 charge. He argues that there exist two preemption doctrines: first, the statutory doctrine contained in Para. 60c(5)(a), Part IV, Manual for Courts-martial (MCM), United States, 1984; and, second, the common law doctrine discussed in *United States v. Wright*, 5 M.J. 106

DENCE INQUIRY DID NOT ESTABLISH THAT APPELLANT ACTED IN BAD FAITH.

IV. THE MILITARY JUDGE ERRED BY ACCEPTING APPELLANT'S PLEA OF GUILTY TO CHARGE II, SPECIFICATION 5 BECAUSE ANY VIOLATION OCCURRED MORE THAN TWO YEARS BEFORE THE RECEIPT OF SWORN CHARGES AND APPELLANT DID NOT AFFIRMATIVELY WAIVE THE STATUTE OF LIMITATIONS.

V. A SENTENCE WHICH INCLUDES AN UNSUSPENDED BAD-CONDUCT DISCHARGE AND TWO YEARS CONFINEMENT IS INAPPROPRIATELY SEVERE FOR THE OFFENSE OF REMOVING CLASSIFIED DOCUMENTS FROM THEIR PROPER PLACE OF STORAGE AND KEEPING THEM AT HOME IN AN UNSECURED AREA.

Additional Assignment of Error:

THE CONVENING AUTHORITY WAS SUBJECTED TO UNLAWFUL COMMAND INFLUENCE THROUGH THE SECRETARY OF THE NAVY'S ISSUANCE OF "POLICY GUIDANCE" STATING THAT NATIONAL SECURITY CASES "SHOULD ORDINARILY BE REFERRED TO TRIAL BY GENERAL COURT-MARTIAL." [Footnote omitted.]

(C.M.A.1978). It is the application of the statutory doctrine that he claims prohibits the Article 134 offense charged in this case because it could have been charged as a violation of a lawful regulation under Article 92.

The exact language from Para. 60c that appellant cites as authority follows: "The preemption doctrine prohibits application of Article 134 to conduct covered by Articles 80 through 132." However, appellant has not cited and we are unable to find any authority for the proposition that there exist two preemption doctrines. Instead, in *United States v. Ettleson*, 13 M.J. 348 (C.M.A.1982) and *United States v. Courtney*, 1 M.J. 438 (C.M.A.1976), implicit judicial approval was given to charging the same criminal act under Article 92 or Article 134. Also, our examination of the doctrine's purpose, which is to prevent the Government from redefining crimes by eliminating vital elements from offenses specified by Congress and then charging the remaining elements as an offense in violation of Article 134, convinces us that there is but one preemption doctrine.[4] Further, we find support for this conclusion from the analysis to Article 134 which cites *Wright* and numerous other pre-1984 cases for examples of how the doctrine should be applied in specific circumstances. Analysis, Para. 60, A21-99, MCM. Accordingly, we find that Para. 60c(5)(a), MCM, is the codification of the judicially created preemption doctrine first discussed in *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953).

To apply the preemption doctrine two questions must be answered in the affirmative: first, did Congress intend to limit prosecution of certain criminal activities to "offenses defined in specific articles of the code", and

[4] Even though we find that there is only one preemption doctrine, we note that it is stated twice in the MCM: first, Para. 60c(1), MCM, and second, Para. 60c(5)(a).

second, is the offense charged composed of the residual "elements of a specific offense and asserted to be a violation of . . . Article 134. . . ." *Wright*, 5 M.J. at 110-11, citing *Norris*.

In answering these two questions we find that the preemption doctrine does not apply. As to the first question, even though Congress did not prohibit appellant's actions in a specific Article of the UCMJ, Congress did make appellant's actions criminal in a specific section of Title 18 of the U.S. Code which is incorporated into the UCMJ. Clearly Congress intended that its specific declaration of a criminal statute, which carries a maximum of 10 years confinement, would take precedence over any general criminal prohibition, which carries a less severe maximum of only 2 years. It strains credulity to say that a regulation written by the Chief of Naval Operations, which if violated is charged under Article 92, could preempt a specific federal criminal statute enacted by Congress and incorporated into the UCMJ by Article 134. As to the second question, the charge appellant was convicted of was not modified nor composed of any residual elements but instead consisted of the specific elements of 18 U.S.C. § 793 as established by Congress. Accordingly, we hold that the preemption doctrine is inapplicable to the Article 134 charge appellant was convicted of herein, even though he could have also been charged for violating Article 92. *See United States v. Reichenbach*, 29 M.J. 128 (C.M.A.1989). The Government acted within the bounds of its lawful discretion in deciding to charge appellant with violating 18 U.S.C. § 793. *See United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979); *United States v. Irvin*, 21 M.J. 184, 188 (C.M.A.), *on remand*, 22 M.J. 559 (A.F.C.M.R.), *aff'd in part, dismissed in part*, 22 M.J. 342 (C.M.A.), *cert. denied*, 479 U.S. 852, 107 S.Ct. 183, 93 L.Ed.2d 117 (1986).

II. Sufficiency of Providence Inquiry to 18 U.S.C. § 793(e)

Appellant asserts that his guilty plea to the 18 U.S.C. § 793(e) charge is improvident because this subsection only makes criminal the "unauthorized" possession and retention of classified materials when it was established during the plea inquiry that appellant was initially authorized to possess the classified materials even though he went beyond the scope of his authorization and possessed materials at his residence. Appellant argues that because he was initially "authorized" to possess the classified materials, he always remained "authorized" to possess the materials and therefore, he cannot be guilty of violating § 793(e). Instead, appellant reasons that because he was "authorized" to possess the classified materials, the Government was required to make a demand on appellant to return the documents which is an essential element of a prosecution under § 793(d) but which is inconsistent with the subsection of which he was found guilty. In support of his argument that the term "unauthorized possession" is ambiguous and therefore should be construed narrowly against the Government, appellant has cited our unpublished opinion in *United States v. Volin*, No. 88 1130 (N.M.C.M.R. 19 April 1989), and the case of *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir.1980), *cert. denied*, 454 U.S. 1144, 102 S.Ct. 1004, 71 L.Ed.2d 296 (1982).

As a guide in determining the definition of the term "unauthorized possession" as it is used in § 793(e), we look to the direction given in *Moskal v. United States*, —— U.S. ——, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). In that case, the Supreme Court established three steps a court uses in defining the terms of a criminal statute. First, a court should give all the terms used in the statute their ordinary meaning. Second, if a possible ambiguity exists in the statute when a term's ordinary

meaning is used, then a court must examine the legislative history and motivating policies of Congress in enacting the statute to resolve the ambiguity. And finally, if after applying steps one and two, a reasonable doubt still exists about a statute's intended scope, then the Court will apply the rule of lenity and resolve the ambiguity in favor of the appellant. *Id.*, —— U.S. at ——, 111 S.Ct. at 465, 112 L.Ed.2d at 458.

In resolving this alleged error, we first look to the language of 18 U.S.C. § 793(e). This subsection reads:

> (e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Because we find that the term "unauthorized possession" may be open to the interpretation forwarded by appellant, it is necessary to examine the relevant history of § 793. Prior to September 23, 1950, subsection (e) of § 793 read as follows:

> Whoever, lawfully or unlawfully having possession of, access to, control over, or being intrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, willfully communicates or transmits or attempts to communicate or transmit the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive;
>
> * * * * *
>
> Shall be fined not more than $10,000 or imprisonment not more than ten years, or both.

The House report that accompanied the September 23 amendment reported why Congress foresaw a need to amend the statute:

> serious gaps in our present laws permit people, both citizens and aliens alike, opportunities to acquire information vital to our national security and to use that information to the disadvantage and danger of the United States without fear of prosecution in our courts.

H.R.Rep. No. 647, 81st Cong., 1st Sess. (1949) at 2. Specifically regarding subsection (e), Congress, in dividing the then-existing subsection into subsections (e) and (f), intended that the statutory change would produce the following effect:

> Subsection 1(e) provides separately for those who, having unauthorized possession of certain enumerated classes of items, refuse to surrender them to authorized officials regardless of a demand being made. Existing law provides no penalty for the unauthorized possession of such items unless a demand for them is made by a person entitled to re-

> ceive them. Thus subsection 1(e) differs from subsection 1(d) primarily in that a demand for return is a necessary element in making out a case in the latter instance, while it is not required in the former. The term "unauthorized possession" is used deliberately in preference to "unlawful possession," so as to preclude the necessity for proof of illegal possession.

Id., at 4.

From a reading of the legislative history, we find that it was the intent of Congress to broaden the statute by eliminating the requirement that a demand be made for the return of materials relating to the national defense in certain instances. We must next analyze whether the interpretation advanced by appellant is consistent with this intent. Appellant's theory that once the possession of materials is authorized, it remains authorized, would force a peculiar result. Appellant would only be criminally liable under this statute for the removal of classified material (of which he had authorized access) to his home in the civilian community if the Government made a demand for its return. In order for the Government to make such a demand, it would have to know of appellant's actions, actions which appellant or anyone else would certainly conceal. We believe that such an interpretation would thwart the Congressional intent and purpose behind subsection (e).

Accordingly, we find that appellant's initial authorized possession of the classified materials became unauthorized when he exceeded the parameters of the entrustment given to him to possess, have access to, or control the classified materials. Thus, appellant's unauthorized possession satisfied the first element of § 793(e). Furthermore, in retaining the documents that he had a reason to know could be used to the injury of the United States or to the advantage of any foreign nation and failing to return them to a duly authorized officer to receive the ma-

terials, appellant satisfied the second element of subsection (e) and was, therefore, guilty of violating § 793. Accordingly, his pleas of guilty were provident.

As to the two cases cited by the appellant as authority for his argument that because he was initially an authorized possessor of the classified documents he did not violate § 793(e), we distinguish those cases on their facts. First, as appellate government counsel points out in her brief, *Volin* is a sufficiency of the evidence case and does not establish a rule of law concerning the definitions of terms used in § 793(e). Second, the footnote cited by appellant from the case of *Truong Dinh Hung*, in which the Court of Appeals mentioned that there existed a possible ambiguity in § 793(e), merely establishes with approval how the district judge artfully constructed his instructions so as to avoid the potential ambiguity, and therefore, it does not provide legal support for appellant's argument.

III. The Mens Rea Requirement for § 793(e)

Appellant has also argued that his plea to the § 793(e) charge is improvident because the military judge failed to include within the "willful" mens rea requirement a bad faith purpose. Appellant has cited *Truong Dinh Hung* and *United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988), for support.

The two cases cited by appellant, however, involved the appellate review of the jury instructions given by the trial judge. They do not establish a rule of law that § 793(e) requires a bad faith purpose. We are aware of no case that creates a requirement of a bad faith purpose and a reading of the legislative history reveals that Congress specifically did not intend for such requirement in § 793(e). *See* H.R.Rep. No. 647, 81st Cong., 1st Sess. (1949), at 3 (subsections (d) and (e) were specifically drafted without the need for an element of intent, while

subsections (a), (b), and (c), in contrast, have an express requirement of intent.)[5] Accordingly, we hold that appellant was properly advised as to the mens rea requirement for a conviction under § 793(e) and that he admitted facts sufficient to establish his guilt.

IV. Appropriateness of Sentence

Upon review of the record of trial, the offenses of which appellant stands convicted, and the evidence offered in extenuation and mitigation, we find that a sentence including an unsuspended bad-conduct discharge and two years confinement is appropriate. *United States v. Healy*, 26 M.J. 394 (C.M.A.1988).

Conclusion

We hereby dismiss Specification 5 of Charge II. In adjudging the sentence, the military judge found all four offenses multiplicious and therefore, even with the dismissal of Specification 5 of Charge II appellant has suffered no prejudice. The remaining findings of guilty and the adjudged sentence are affirmed.

Chief Judge WILLEVER and Senior Judge JONES concur.

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[5] The cited legislative history mentions only subsection (d) specifically, however, we believe that Congress intended that it also apply to subsection (e).

APPENDIX C

U.S. Const. art. II, § 2

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

APPENDIX D

10 U.S.C. § 826. Uniform Code of Military Justice art. 26.

§ 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge

Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

APPENDIX E

Manual for Courts-Martial, United States, 1984,
Rule for Courts-Martial 801

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge.* The military judge is the presiding officer in a court-martial.

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

(2) Ensure that the dignity and decorum of the proceedings are maintained;

(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purpose of these rules and this Manual;

(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

(b) *Rules of court; contempt.* The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence.* The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

(d) *Uncharged offenses.* If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-

martial, the court-martial shall proceed with the trial of the offense charged.

(e) *Interlocutory questions and questions of law.* For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) *Rulings by the military judge.*

(A) *Finality of rulings.* Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling.* The military judge may change a ruling made by this or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions.* When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

(2) *Rulings by the president of a special court-martial without a military judge.*

(A) *Questions of law.* Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) *Questions of fact.* Any ruling by the president of a special court-martial

without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) *Changing a ruling.* The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) *Presence of members.* Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) *Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member.*

(A) *Determination.* The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) *Instructions.* When a ruling by the president of a special court-martial without a military judge is subject to objec-

tion, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) *Voting.* When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) *Consultation.* The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) *Standard of proof.* Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party making the motion or raising the objection shall bear the burden of persuasion.

(5) *Scope.* Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

(f) *Rulings on record.* All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

(g) *Effect of failure to raise defenses or objections.* Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

APPENDIX F

[SEAL] [SEAL]

THE DEPUTY SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301-1000

March 3, 1992

MEMORANDUM FOR:

SECRETARIES OF THE MILITARY DEPARTMENTS
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Ensuring Execution of the Laws and Effective Delivery of Legal Services

Among the chief duties of the Secretary of Defense and the Secretaries of the Military Departments is the faithful execution of the laws of the United States. Effective performance of that duty requires that the Department of Defense have a single chief legal officer and that each Military Department have a single chief legal officer. They should be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services. Section 139 of Title 10 of the United States Code provides that the General Counsel of the Department of Defense is the chief legal officer of the entire Department of Defense. As such, the General Counsel of the Department of Defense is responsible and accountable to the Secretary of Defense for and has the authority necessary to ensure uniform, proper interpretation and application of the law and delivery of legal services throughout the Department of Defense. The purpose of this memorandum is to provide similarly for a single chief legal officer for each of the Military Departments within the Department of Defense.

Accordingly, pursuant to Title 10, including Sections 113, 3011, 5011, and 8011, and Department of Defense Directive 5105.2, this is to direct effective immediately as follows:

(1) The General Counsels of the Military Departments shall be the chief legal officers of their respective departments, responsible to and subject to the authorities of the Secretaries of the Military Departments as the heads of the Military Departments and the General Counsel of the Department of Defense as the chief legal officer of the Department of Defense.

(2) The General Counsels of the Military Departments shall be responsible and accountable for proper, effective and uniform interpretation and application of the law and delivery of legal services within their respective departments.

(3) Civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretary of a Military Department shall be subject to the authority of the General Counsel of that Military Department with respect to the performance of those legal duties.

(4) The General Counsels of the Military Departments shall ensure that civilian and military personnel performing legal duties with respect to organizations or functions under the jurisdiction of the Secretaries of the Military Departments comply with applicable statutory, regulatory, and ethical standards of the legal profession in the performance of those duties.

(5) The legal opinions of the General Counsels of the Military Departments shall be the controlling legal opinions of their respective Departments.

(6) The General Counsels of the Military Departments, subject to the authority, direction and control of the

Secretaries of the Military Departments, shall implement this memorandum in a manner consistent with applicable law, including Sections 806, 825, 827, 854 through 870, 873, 874, and 945 of Title 10.

Nothing in this memorandum shall be deemed to create any right in any person not otherwise prescribed by law or regulation.

/s/ D.J. Atwood

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Supreme Court, U.S.
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No. 92-1017

In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES F. MCGUINESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military to serve as court-martial trial judges.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Allen v. *United States*, cert. denied, 113 S. Ct. 324 (1992)	2, 5
Bolado v. *United States*, cert. denied, 113 S. Ct. 321 (1992)	2
Davis v. *United States*, 411 U.S. 233 (1973)	4
Freytag v. *Commissioner*, 111 S. Ct. 2631 (1991)	4
Murray v. *Carrier*, 477 U.S. 478 (1986)	4
Solorio v. *United States*, 433 U.S. 435 (1987)	3
Taylor v. *Freeland & Kronz*, 112 S. Ct. 1644 (1992)	3
United States v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992)	5
United States v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992)	5
United States v. *Weiss*, No. 67869/MC (C.M.A. Dec. 21, 1992)	4-5
Wainwright v. *Sykes*, 433 U.S. 72 (1977)	4
Williams v. *United States*, cert. denied, 113 S. Ct. 379 (1992)	2
Youakim v. *Miller*, 425 U.S. 231 (1976)	3

Constitution, statutes, and rule:

U.S. Const. Art. II, § 2, Cl. 2 (Appointments Clause)	2
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 67(d), 10 U.S.C. 867(d)	3
Art. 67(h)(1), 10 U.S.C. 897(h)(1)	3
Art. 92, 10 U.S.C. 892	2
Art. 134, 10 U.S.C. 934	2

Statutes and rule—Continued: Page

18 U.S.C. 793(e) 2
18 U.S.C. 793(f) 2
28 U.S.C. 1259(3) 3
Courts-Martial R. 905(e) 3, 4

Miscellaneous:

Manual for Courts-Martial, United States—1984 3

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1-10a, is reported at 35 M.J. 149. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 11a-21a, is reported at 33 M.J. 781.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 14, 1992. The petition for a writ of certiorari was filed on December 14, 1992 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner pleaded guilty to two counts of violating a lawful general order and two counts of violating the Federal Espionage Act, in violation of Articles 92 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892 and 934, and 18 U.S.C. 793(e) and 793(f).[1] The trial judge sentenced petitioner to confinement for two years, forfeiture of all pay and allowances, reduction to the lowest enlisted rank, and a bad-conduct discharge. On appeal, the Navy-Marine Corps Court of Military Review set aside petitioner's conviction for violating 18 U.S.C. 793(f) on statute of limitations grounds, but affirmed the remaining convictions and the sentence. The Court of Military Appeals exercised its discretionary review and affirmed the judgment of the court of military review.

ARGUMENT

Petitioner maintains that the military trial judge was not qualified to hold that position because he was appointed to it by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. That claim does not warrant review by this Court, for several reasons.[2]

First, petitioner has not properly preserved his claim for review by this Court. Petitioner did not raise this contention at or before trial and, therefore, has waived

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[1] Article 134 of the UCMJ, 10 U.S.C. 934, allows service members to be tried by courts-martial for violating any non-capital federal criminal statute.

[2] This Court has denied certiorari on that question twice this Term. *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992); *Williams* v. *United States*, cert. denied, 113 S. Ct. 379 (1992); see also *Bolado* v. *United States*, cert. denied, 113 S. Ct. 321 (1992) (applying same principle to the selection of judges on the courts of military review). There is no reason to treat the petition in this case differently.

his claim under the rules of military procedure. Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States—1984*, at II-109.[3] Petitioner also did not raise this claim in the Navy-Marine Corps Court of Military Review or in the Court of Military Appeals, and neither court addressed petitioner's contention. Petitioner, therefore, cannot raise that claim for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]."") (quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[4]

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[3] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

[4] The Court of Military Appeals did not grant review on this question. Accordingly, it is not clear that this question is subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 28 U.S.C. 1259(3) and 10 U.S.C. 867(h)(1), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67(h)(1), UCMJ, 10 U.S.C. 867(h)(1), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory right to limit its decisions in any case to less than all the issues urged by the accused. See 10 U.S.C. 867(d). Since petitioner did not raise this issue for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issue that petitioner presents in his petition. For the reasons given in the

Relying on *Freytag* v. *Commissioner*, 111 S. Ct. 2631 (1991), petitioner asks this Court to forgive his waiver. *Freytag* involved an Appointments Clause challenge to the selection of special trial judges by the chief judge of the Tax Court, a challenge that the petitioners had not raised in that court. This Court said that it had the power to excuse the petitioners' waiver, and found *Freytag* to be "one of those rare cases in which we should exercise our discretion to hear petitioners' challenge" despite his failure to assert it in the courts below. 111 S. Ct. at 2639. Petitioner urges the Court to follow the same approach in this case.

Freytag, however, did not involve a rule of procedure, like Rule for Courts-Martial 905(e), requiring a defendant to raise a claim in a timely manner on pain of forfeiture. That difference is material. For the past two decades, this Court has consistently declined to review defendants' claims that have not been properly preserved under the rules of trial and appellate procedure unless the defendant can establish both "cause" and "actual prejudice" for his default. See, *e.g.*, *Davis* v. *United States*, 411 U.S. 233 (1973); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Murray* v. *Carrier*, 477 U.S. 478 (1986). Petitioner has made no effort to satisfy that test. In any event, petitioner has not explained why the question in this case is of such imperative public importance that this Court should deviate from its firmly settled practice of declining to serve as a nisi prius court.

Second, there is no conflict among the circuits on the question presented by the petition. The Court of Military Appeals and two courts of military review have rejected the claim raised by petitioner. *United States* v.

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text, however, it is unnecessary to answer that question in this case, since the question presented in the certiorari petition does not warrant review by this Court in any event.

Weiss, No. 67869/MC (C.M.A. Dec. 21, 1992); *United States* v. *Prive*, 35 M.J. 569 (C.G.C.M.R. 1992); *United States* v. *Coffman*, 35 M.J. 591 (N.-M.C.M.R. 1992). No federal appellate court has ruled to the contrary.

Third, petitioner's claim lacks merit. The question presented in this case is identical to the one presented in *Allen* v. *United States*, cert. denied, 113 S. Ct. 324 (1992) (No. 92-273). We rely upon our brief in opposition in that case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1993

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[5] We have supplied petitioner's counsel with a copy of our brief in opposition in *Allen*.